

March 22, 1991

MEMORANDUM

TO: The Honorable Rene Mansho
City Councilmember, City and County of Honolulu

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Honolulu Police Department Standards of Conduct

This is in reply to your letter dated March 7, 1990, requesting an advisory opinion from the Office of Information Practices ("OIP") concerning public access to the Honolulu Police Department ("HPD") Standards of Conduct.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), HPD policies entitled "Standards of Conduct" must be made available for public inspection and copying.

BRIEF ANSWER

Under the UIPA, all government records must be made available for public inspection and copying unless one of the exceptions set forth at section 92F-13, Hawaii Revised Statutes, protects the record from required agency disclosure. See Haw. Rev. Stat. . 92F-11(b) (Supp. 1990). In reviewing the UIPA's statutory exceptions to public access, and the HPD's Standards of Conduct, we conclude that the only potentially applicable UIPA exception is that which applies to government records which, if disclosed, would frustrate a legitimate government function. Haw. Rev. Stat. . 92F-13(3) (Supp. 1990).

However, because the disclosure of the HPD Standards of

Conduct would neither impede the HPD's enforcement of criminal laws, nor expose predecisional, deliberative communications within the HPD, we conclude that this government record is not protected from disclosure by section 92F-13(3), Hawaii Revised Statutes, and must be made available for inspection and copying upon request by any person. Haw. Rev. Stat. . 92F-11(b) (Supp. 1990).

FACTS

The HPD's Chief of Police adopted policies entitled "Standards of Conduct of the Honolulu Police Department," effective March 31, 1986. This government record is divided into thirteen separate articles, and its preamble states that the Standards of Conduct "are published for the control, disposition, and government of the officers and civilian employees of the Honolulu Police Department."

Article I of the the Standards of Conduct ("Standards"), entitled "Honolulu Police Department" describes the organization of the police department, the minimum qualifications required of the chief of police, and the chief's duties, responsibilities, and authority. Article II of the Standards describes the police officer appointment process, and the actual form of any such appointment by the chief. Article III sets forth the oath of office to be taken by each officer of the HPD. Article IV describes the personnel to whom the Standards apply, and the process for the amendment, repeal, and publication of the Standards. Article V of the Standards, entitled "Code of Ethics," sets forth the ethical canons to which every HPD officer must adhere. Article VI generally describes the duties of and responsibilities of superior and supervisory officers. Article VII of the Standards, entitled "Discipline, Professional Guidelines and Responsibilities," sets forth the burden of proof necessary for taking disciplinary action; the levels of disciplinary action that may be imposed upon an officer for the violation of the Standards; "professional guidelines" to be followed by each officer; and a description of each officer's responsibilities. Article VIII, entitled "Standards," sets forth a description of the types of conduct that an officer must either affirmatively engage in, or refrain from engaging in. This article additionally categorizes violations of the standards by the level or severity of the offense.

Article IX of the Standards, entitled "Suspensions, Leave Pending Investigation, and Dismissals," describes the authority of supervisors to suspend and place an officer on leave with or without pay pending an investigation of violations of the standards of conduct, the limitations on such authority, and the

job titles of those officers who have authority to take such action. Article X sets forth procedures that must be followed for the discipline of any employee of the department; article XI delineates the procedure for making a voluntary resignation; article XII sets forth definitions of terms used in the Standards; and article XIII contains a "separability" clause.

In addition to your letter requesting an advisory opinion from the OIP concerning public access to the HPD Standards, the OIP received a similar request from Mr. Jahan Byrne. By letter dated October 23, 1989, Mr. Byrne requested the HPD to make a copy of its Standards available for his inspection. In a letter to Mr. Byrne dated October 31, 1989 denying his UIPA request, the HPD stated:

We consider our standards of conduct to be an internal management document that does not affect the private rights of, or procedures available to, the public. Thus, the provisions of [c]hapter 92F are not applicable to your request.

In connection with the OIP's preparation of this opinion, at the OIP's request, the HPD has voluntarily furnished a copy of its Standards to the OIP for its review, pursuant to the authority granted to the OIP under section 92F-42(2), (3) and (5), Hawaii Revised Statutes.

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law."

Haw. Rev. Stat. . 92F-11(a) (Supp. 1990). Thus, unless a government record is protected from disclosure by one of the statutory exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, "each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. . 92F-11(b) (Supp. 1990) (emphasis added).

Additionally, in enacting the UIPA, the Legislature set forth a list of government records which must be made available for inspection and copying as a matter of public policy, or "[a]ny provision to the contrary notwithstanding." Section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

.92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

- 1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;

Haw. Rev. Stat. . 92F-12(a)(1) (Supp. 1990).

In OIP Opinion Letter No. 90-34 (Dec. 17, 1990), we concluded that section 92F-12(a)(1), Hawaii Revised Statutes, requires that agencies make available for public inspection those administrative rules it has adopted pursuant to the rulemaking provisions of chapter 91, Hawaii Revised Statutes. Additionally, we opined that under section 92F-12(a)(1), Hawaii Revised Statutes, agencies must also make available for inspection and copying agency interpretative statements which clarify or interpret statutes or regulations that the agency administers.

Based upon our review of the HPD's Standards, it would not appear that they are either administrative "rules" or an interpretative statement adopted by the HPD. Therefore, we shall turn to a consideration of whether the HPD Standards are protected by one of the UIPA's statutory exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes.

II. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

The only UIPA statutory exception to required agency disclosure that potentially applies to the HPD Standards, is that which does not require an agency to disclose "[g]overnment records that, by their nature, must remain confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. . 92F-13(3) (Supp. 1990).

In previous OIP opinion letters, we concluded that this UIPA exception applies to certain internal or agency administrative policies and to certain "intra-agency memoranda." However, a government record may constitute an "internal" agency record, and nonetheless be subject to inspection and copying under the UIPA. Accordingly, we shall examine these aspects of the UIPA's frustration of legitimate government function exception separately below.

A. Agency Internal or Personnel Policies.

In OIP Opinion Letter No. 90-34 (Dec. 17, 1990), based upon court decisions applying Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. . 552 (Supp. 1990) ("FOIA"), we concluded that in addition to those records mentioned by the UIPA's legislative history,¹ the UIPA's "frustration" exception applies, among other things, to agency administrative policies or procedures which are (1) "predominately internal," and (2) the disclosure of which would significantly risk the circumvention of agency statutes or regulations that the agency is charged with enforcing, or significantly impede an agency's enforcement process.² See Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981).

Exemption 2 of FOIA has been found to protect a wide variety of information relating to law enforcement activities, including agency guidelines for conducting investigations, see Goldsborough v. IRS, Civil No. 81-1939, slip op. at 15-16 (D. Md. May 10, 1984), guidelines concerning when to pursue an investigation, see Wilder v. IRS, 601 F. Supp. 241, 242-43 (M.D. Ala. 1984), and guidelines for spotting law violators, see, e.g., Williston Basis Interstate Pipeline Co. v. Federal Energy Regulatory Commission, Civil No. 88-0592, slip op. at

¹See Senate Standing Committee Report No. 2580, dated March 31, 1988 for examples of other government records, or information therein, that the Legislature indicated need not be disclosed if doing so would result in the frustration of a legitimate government function.

²Exemption 2 of the FOIA has also been found to protect internal agency personnel policies that are of "trivial" significance, such as personnel rules pertaining to employee parking, lunch hours, or statements of policy as to sick leave, which are of no legitimate public interest. This aspect of Exemption 2 was intended "relieve the agency from the administrative burden of processing FOIA requests when internal matters are not likely to be the subject of public interest." Martin v. Lauer, 686 F.2d 24, 34 (D.C. Cir. 1982). Because the disclosure of "trivial" agency personnel policies would not frustrate a legitimate government function, the exception set forth by section 92F-13(3), Hawaii Revised Statutes, cannot possibly shield such agency personnel policies from required agency disclosure.

3-4 (D.D.C. Apr. 17, 1989). Thus, in OIP Opinion Letter No. 90-34, we concluded that the Department of Public Safety need not make available for inspection and copying those "internal" personnel rules which, if disclosed, would significantly risk the circumvention of prison security measures.

We need not determine whether the HPD's Standards are "predominately internal," because based upon our review of this government record, we find that its disclosure would not significantly risk the circumvention of the law, permit law violators to avoid detection by the HPD, or otherwise impede the HPD's enforcement of criminal laws. It contains no guidelines for pursuing criminal investigations, or for the detection of those who violate state or municipal laws. On the contrary, the Standards set forth those rules of proper conduct to which HPD police officers are expected to adhere when performing their official duties or when interacting with the public, and procedures governing the discipline of HPD officers for violation of those standards. The disclosure of this government record would not, in the words of the Crooker court, "benefit those attempting to violate the law and avoid detection." 670 F.2d at 1053.

This conclusion is significantly supported by a memorandum decision of the U.S. District Court for the District of Columbia, in FBI Agents Association, et. al. v. Federal Bureau of Investigation, 3 Gov. Doc. Serv. para. 83,058 (D.D.C. 1981). In FBI Agent Association, the FBI had denied access to those portions of its Manual of Administrative Operations and Procedures, that pertained to equal employment opportunity grievances and its standards of conduct. In reviewing the FBI's claim that its standards of conduct were exempt from required agency disclosure under Exemption 2 of the FOIA, the court concluded otherwise. Specifically, the court concluded that the FBI standards of conduct were neither "trivial" personnel policies or guidelines, nor records, which if disclosed, would significantly impede the FBI's enforcement process. The court reasoned that:

There is no question that the FBI occupies a unique position in the United States and as such, the public has a keen interest in the discipline of those assigned to carry out the awesome responsibilities charged to the agency. . . . Thus, it seems difficult to believe that the code of conduct governing FBI agents and the discipline they would be subject to if they failed to follow that code would not be of public interest.

FBI Agents Association, 3 Gov. Doc. Serv. at para. 83,566.

Accordingly, we conclude that the disclosure of the HPD Standards, even if "predominately internal," would not significantly risk the circumvention of the law, or impede the HPD's enforcement process.

B. Intra-Agency Memoranda.

In previous OIP opinion letters, we concluded that the UIPA's frustration of legitimate government function exception permits agencies to withhold disclosure of certain intra-agency memoranda. As noted by the HPD in its written reply to Mr. Jahan Byrne, it considers its Standards to be an "internal management document." However, under the UIPA, not all intra-agency memoranda would frustrate a legitimate government function, if disclosed.

Accordingly, we previously opined that in order for an intra-agency memorandum to be protected by section 92F-13(3), Hawaii Revised Statutes, it must be within the scope of the common law "deliberative process privilege," that is, such memorandum must be both "predecisional" (antecedent to the adoption of agency policy) and "deliberative" (a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters to an agency decisionmaker). See OIP Op. Ltr. Nos. 89-9 (Nov. 20, 1989); 90-3 (Jan. 18, 1990); 90-8 (Feb. 9, 1990); and 90-21 (June 12, 1990). Accordingly, if an intra-agency memorandum is not "predecisional" and "deliberative," it is not protected from disclosure by the UIPA's frustration of legitimate government function exception.

The purpose of the "deliberative process privilege" is to: (1) protect the quality of agency decisionmaking by encouraging open, frank, and candid discussion on matters of policy between subordinates and superiors; (2) protect against premature disclosure of proposed policies before they are finally adopted; and (3) protect against public confusion that might result from disclosure of rationales and reasons that were not in fact ultimately the grounds for an agency's action.

In our opinion, the HPD Standards do not fall within the scope of the common law deliberative process privilege. This government record is not predecisional and, on the contrary, embodies the agency's final decision on issues of personnel policy. Additionally, the HPD Standards contain no advice, opinions, or recommendations from agency subordinates to agency decisionmakers on issues of agency law or policy. Rather, as noted above, it sets forth a police officer code of conduct. Accordingly, we conclude that this government record is not

protected from disclosure under the UIPA as an intra-agency memorandum which, if disclosed, would frustrate a legitimate government function, by impairing the quality of agency decisionmaking.

Because the HPD Standards are not protected from disclosure under the UIPA's frustration of legitimate government function exception, and because this record is not protected from disclosure by State or federal law or by court order, see section 92F-13(4), Hawaii Revised Statutes, and would not result in a clearly unwarranted invasion of personal privacy, see section 92F-13(1), Hawaii Revised Statutes, we conclude that the Standards must be made available for inspection and copying upon request by any person. Haw. Rev. Stat. . 92F-11(b) (Supp. 1990).

CONCLUSION

The disclosure of the HPD's Standards of Conduct would not result in the frustration of a legitimate government function under the UIPA and, therefore, must be made available for public inspection and copying. The disclosure of this government record would neither impede the HPD's enforcement of criminal laws, nor expose an intra-agency memorandum that is predecisional.

Hugh R. Jones
Staff Attorney

HRJ:sc

cc: The Honorable Michael S. Nakamura
Chief of Police, City and County of Honolulu

Captain Robert Prasser
Honolulu Police Department
Records & Identification Division

Mr. Jahan Byrne

APPROVED:

Kathleen A. Callaghan
Director